APPEAL NO. 030994
FILED JUNE 11, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on March 27, 2003, in (city 1). The hearing officer determined that the claimed injury occurred while the appellant (claimant) was in a state of intoxication, as defined in Section 401.013, from the introduction of a controlled substance, thereby relieving the respondent (carrier) of liability for the injury, and that the claimant did not have disability. The claimant appeals, asserting that there was no jurisdiction to conduct the CCH in city 1, as responsibility for the claim had been transferred to the (city 2) field office of the Texas Workers' Compensation Commission (Commission); that the chain of custody for the urine sample was not established or even provided to the claimant despite several requests, and the carrier had not shown that a chain of custody was unnecessary; that the finding that the claimant did not have the normal use of his mental and physical faculties at the time of his injury was contrary to the evidence; and that the evidence established that the claimant had disability since the date of injury. The carrier responds, urging that venue was proper in city 1; that the chain of custody is sufficient; and that the evidence sufficiently supports the hearing officer's determinations of intoxication and no disability.

DECISION

Affirmed, as reformed.

Claimant's Exhibit No. 3 is a March 5, 2003, letter from the Commission that advises that the claimant's claim has been transferred to the city 2 field office, based on records that showed the claimant's current address as being in city 2. We note that Hearing Officer's Exhibit No. 1, the February 4, 2003, cover letter to the benefit review conference report, provides notice that this CCH was scheduled for March 27, 2003, at the "[city 1] FIELD OFFICE." The claimant's position is essentially that the transfer of the claim file to the city 2 field office took jurisdiction away from the city 1 field office. We disagree. The venue provision in the 1989 Act is found in Section 410.005(a), and simply provides that a CCH must be held at a site not more than 75 miles from the claimant's residence at the time of the injury. The claimant testified as to where he lived at the time of the injury, but did not assert that he lived more than 75 miles from city 1. The claimant asserts no authority for his argument that transferring a claim file results in a field office losing jurisdiction to hold a CCH, and we know of no such authority. The assertion is without merit.

The claimant worked as a driller in an oil field. He was severely injured on _____, when a 6,000 pound piece of equipment that he was cleaning fell on him. The claimant was taken to a nearby hospital, and a routine urine drug screen was collected within several hours after the injury. The urine tested positive for marijuana

and morphine,[1] with the quantitative drug test showing a level of 301 nanograms per milliliter (ng/ml) of marijuana metabolites. A peer review doctor's report stated that the claimant met the criteria for the definition of intoxication found in Section 401.013. The claimant sought to show that he was not intoxicated through his testimony about when his last marijuana use occurred and about the events that occurred on the day that he was injured.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication in Section 401.013(a) includes the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. The law presumes that a claimant was sober at the time of an injury; however, the carrier can, with probative evidence of intoxication, rebut this presumption and shift the burden to the claimant to prove that he was not intoxicated. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. Regarding the quality of the carrier's evidence of intoxication to shift the burden of proof, in Texas Workers' Compensation Commission Appeal No. 92224, decided July 16, 1992, a marijuana intoxication case involving disparate results in blood and urine tests, the Appeals Panel stated as follows:

> [W]e have never held nor implied that a carrier must present scientific evidence and/or expert testimony in order to raise the intoxication exception. That does not detract from the matter that evidence offered to raise the issue of intoxication and erase the presumption of sobriety thereby shifting the burden back to claimant, must have some probative value and not be so weak as to be meaningless or amount to no more than a mere scintilla.

The Appeals Panel has often recognized that a positive urinalysis test result will generally suffice to shift the burden of proof to a claimant to establish that he or she was not intoxicated at the time of the injury. *See* Texas Workers' Compensation Commission Appeal No. 991476, decided August 24, 1999, and cases cited therein.

In this case, the positive drug screen taken within a few hours of the accident, the quantitative testing establishing the 301 ng/ml marijuana metabolite level, and the doctor's opinion are sufficient to shift the burden to the claimant to prove that he was not intoxicated. The claimant attempted to do so through his own testimony which the hearing officer was free to accept or reject. The hearing officer could consider all the testimony and the reasonable inferences that the testimony raised including the fact that there was no formal chain of custody.

[1] We note that the hearing officer erroneously stated that the claimant tested positive for cocaine. The lab report showed positives for marijuana and morphine, and we view the silence throughout the record about the morphine positive as tacit acceptance that the claimant was treated with a morphine based drug prior to the collection of the urine sample. We will correct the hearing officer's error by reformation.

As to chain of custody, the claimant's attorney argued that the carrier had not responded to interrogatories and requests for information about the chain of custody, but admitted that no subpoena was requested to compel production of such information. As part of his chain of custody argument, the attorney offered Claimant's Exhibit No. 2, a letter from Dr. C with an attached affidavit from the claimant. The hearing officer excluded the exhibit because it had not been timely exchanged. Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Given the untimely exchange of the exhibit, we do not find the hearing officer's evidentiary ruling to be an abuse of discretion, as she acted with reference to guiding rules and principles. Nor did the claimant establish that the exclusion of this evidence probably caused the rendition of an improper judgment.

We have reviewed the determination that the claimant was injured while in a state of intoxication and conclude that this issue involved a fact question for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We hold that the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16). The fact that the claimant was found to be intoxicated at the time of his injury makes the injury not compensable.

As noted in the footnote, we reform the portions of the hearing officer's decision which refer to "cocaine" to refer instead to "morphine."

We affirm the decision and order of the hearing officer, as reformed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET, SUITE 2900
DALLAS, TEXAS 75201.

_____
Michael B. McShane
Appeals Panel
Manager/Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Edward Vilano
Appeals Judge